Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
Review of the Syndication and Financial Interest Rules, Sections 73.659-72.663 of the Commission's Rules	)	MM Docket No. 95-39

REPLY COMMENTS OF THE

COALITION TO PRESERVE THE FINANCIAL INTEREST AND SYNDICATION RULE

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The Two Sides of the Networks' Story

Network Comments in the FISR Proceeding:

"[T]he three original networks are even weaker today than they were in . . . [1993]."

NBC Comments at 3 (quoting *Capital Cities /ABC v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994)).

"There is an enormous amount of evidence . . . that these other [broadcast and cable] channels are now substantial competitors for the programs sought by the networks."

Brief for Petitioner Capital Cities/ABC, Inc., *Schurz Communications v. FCC*, No. 91-2350 at 30 (April 16, 1992).

"[P]rogram services distributed by cable . . . rely heavily on original programming."

ABC Comments at 7.

"The competition faced by the three original networks continues to increase at Mach speed: . . . UPN and WB Networks are successfully launched."

NBC Comments at 4.

Network Comments in the TV Ownership Proceeding:

"And even with all the audience fragmentation of today, the biggest concentration of TV rating points still rests with a handful of players, primarily ABC, CBS and NBC. . . .These audiences outweigh the combined viewership of all other TV sources. . . ."

Network Economists' Report, Vol. 2, App. H at 10 (quoting Advertising Age, Spring (1995)).

"No one can compete with the networks in [the programming] arena . . . . Only the networks have the wherewithal to afford the kind of high quality programming that the American public demands.

Network Economists' Report, Vol. 2, App. H at 36.

"[T]he larger cable networks provide mostly mass appeal fare -- much of it reruns off the Nets."

Network Economists' Report, Vol. 2, App. H at 36.

"At this stage, these new 'networks' are closer to syndicators than real networks. . . . Both UPN and WB's long term viability is limited."

Network Economists' Report, Vol. 2, App. H at 33 (citing Media Edge Feb. Report).

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REPLY COMMENTS OF THE COALITION TO PRESERVE THE FINANCIAL INTEREST AND SYNDICATION RULE

The Coalition to Preserve the Financial Interest and Syndication Rule (the "Coalition") submits these comments in reply to the comments submitted by Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting, Inc. in the above captioned proceeding.

SUMMARY AND INTRODUCTION

The networks would have the Commission believe that this proceeding is unnecessary. There is no reason, in the networks' view, for the Commission to analyze whether the public welfare benefits that the Commission predicted would result from its repeal of the financial interest rule have, in fact, been realized. According to the networks, the Seventh Circuit has left the Commission no choice but to allow the remaining provisions of the financial interest and syndication rule (the "FISR" or the "Rule") to expire. NBC presents the argument most bluntly, claiming that the Seventh Circuit "*admonished the Commission not to change its mind about deregulating the television program marketplace* at the end of the specified phase out period."[1]

The Coalition has no doubt that the networks would like to see the Seventh Circuit replace the Commission as the entity responsible for regulating the communications industry. The fact of the matter remains, however, that Congress delegated this responsibility to the Commission. It is the Commission's obligation, therefore, to determine whether its 1993 decision to phase out the FISR has served the public interest. If the Commission concludes that elimination of the financial interest rule has not resulted in the public welfare benefits it predicted, then the Commission will be fully justified in retaining the syndication safeguards and readopting certain financial interest safeguards. Indeed, for the Commission to take any other action would be arbitrary and capricious.

All three networks remind the Commission of the Seventh Circuit's "warning" that it had better have "an excellent, a compelling reason" to strengthen the FISR.[2] This "warning" is *not,* of course, based on the standard of review that applies to

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1 NBC Comments at 2 (emphasis supplied). *See also* CBS Comments at 10; ABC Comments at 1-2.

2 CBS Comments at 10 (quoting *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994)). *See also* ABC Comments at 2; NBC Comments at 2.

agency action. A decision by the Commission to strengthen the FISR must be upheld so long as the agency provides "a reasoned analysis for the change."[3] To the extent that the networks are asserting that a heightened standard of review would (or should) apply to a Commission decision to preserve or strengthen the FISR, they are simply wrong as a matter of law.

The record of network conduct since the financial interest rule was repealed in 1993 requires the Commission, at a minimum, to preserve the existing Rule until there is *evidence*, not just speculation, that repeal will benefit the viewing public. In affirming the Commission's decision to preserve portions of the FISR, the Seventh Circuit observed that "[p]hased deregulation is common, practical, and sensible."[4] The court observed that the Commission's decision was based, in part, on the agency's fear that "the theoretical analysis which it adopted from [the court's] previous opinion may be wrong."[5] "Well," the court acknowledged, "*it may be*."[6] Accordingly, the Seventh Circuit concluded that it could not "pronounce the agency arbitrary and capricious for deciding to proceed in a more cautious manner that will enable it to observe the operation of a partially deregulated market before allowing deregulation to become complete."[7]

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3 *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

4 *Capital Cities/ABC*, 29 F.3d at 316.

5 *Id.*

6 *Id.* (emphasis supplied). *See also Schurz Communications, Inc. v. FCC,* 982 F.2d 1043, 1051 (7th Cir. 1992) (The court acknowledges that its analysis is "speculative, theoretical, and may . . . be all wet.").

7 *Capital Cities/ABC,* 29 F.3d at 316.

The Seventh Circuit's theoretical analysis of the FISR, which the Commission fully embraced in its 1993 decision, has in fact proven to be wrong. As we fully demonstrate in our initial comments, none of the benefits the Commission predicted would flow from the repeal of the financial interest rule has come to pass. For example, the "small, least established" producers, who the Commission predicted would be the beneficiaries of the Rule's repeal, have been (as the Coalition predicted) the most immediate victims of the networks' practices. And, as graphically illustrated in Appendix B, the networks' own data unequivocally demonstrate that repeal of the financial interest rule has diminished, not enhanced, diversity.

Thus, for the first time since the Commission began its reexamination of the FISR, the agency has before it a record that reflects not simply the predictions of the parties, but also evidence of the networks' conduct absent regulation. This record thus provides a substantial basis -- indeed, it provides "an excellent, a compelling reason" -- for the Commission to postpone the sunset of the syndication rule and to strengthen other aspects of the Rule. The record provides no support, in contrast, for the networks' argument that the syndication rule should be repealed immediately because its "*only* effect . . . is to depress the prices networks are willing to pay for off-network rights (thus injuring network program suppliers), as well as to bar new competitive entry into off-network syndication."[8]

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8 ABC Comments at 13-14 (emphasis supplied) (citation omitted).

If the networks' theory were true, then the "injur[ed] network program suppliers" -- *i.e.,* the Coalition's members -- should be arguing vociferously in favor of the Rule's repeal. They are not. On the contrary, the Coalition's members oppose repeal of the FISR precisely because they know, as the record now demonstrates, that the networks' economic theories will evaporate like an early morning fog when exposed to the harsh light of commercial reality. Indeed, given that none of the benefits that the networks and the Commission predicted would flow from repeal of the financial interest rule in 1993 has, in fact, come to pass, a decision by the Commission to rely on similar predictions to permit the syndication rule to expire in November would be "unreasoned and unreasonable."[9]

In short, the record in this matter requires the Commission to preserve the syndication rule and strengthen the FISR in other respects. Because a decision by the Commission to preserve the FISR for the time being necessarily involves "judgmental considerations that are difficult to quantify, it is unlikely to flunk judicial review."[10] The continuing need for the FISR can then be evaluated, in light of the further evolution of the television marketplace, in 1999. As the Seventh Circuit recognized, "[t]he precise timetable on which the Commission executes a major turn in regulatory policy is a matter of judgment and prudence rather than of logic and measurement, and it is confided to the

9 *See Schurz*, 982 F.2d at 1055.

10 *Capital Cities/ABC,* 29 F.3d at 316.

discretion of the Commission within broad limits."[11] Given the record in this proceeding, a decision to preserve the FISR would not fall outside of those broad limits.

I. THE RECORD REQUIRES THE COMMISSION TO PRESERVE THE SYNDICATION RULE

A. The Off-Network Syndication Safeguards Should Be Retained

Each of the Commission's orders concerning the FISR has provided a substantial basis for its finding that a decision to allow the "networks [to] act as syndicators would unfairly influence the program distribution market to the benefit of their affiliates and the detriment of competing independent stations."[12] The networks point to no developments in the marketplace in the last two years that in any way undermine the basis for this finding. Indeed, CBS and NBC do not address the point at all. ABC, for its part, simply repeats a series of theoretical arguments and predictions that derive from the same economic model as its arguments and predictions concerning the repeal of the financial interest rule. The Commission has previously expressed doubt, however, that "the practical outcome would follow theory" in the context of the syndication rule.[13]

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11 *Id.*

12 *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3282, 3320 (1993) ("Second Report and Order").

13 *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 8270, 8295 (1993) ("Recon. Order").

For the reasons set forth below and in our initial comments, these doubts are fully warranted. There is no evidentiary support for ABC's prediction that repeal of the syndication rule will benefit program producers and independent stations. Indeed, if the networks' predictions concerning the repeal of the financial interest rule are used as a benchmark, it is far more likely that producers and independent stations will -- and, ultimately, the public -- be injured by the sunset of the syndication rule in November of this year.

ABC begins its argument by accepting, albeit begrudgingly, the Commission's conclusion that there is a separate market for off-network syndicated programming.[14] ABC contends, however, that the networks cannot engage in anticompetitive behavior in this market because they do not currently own the rights to a large fraction of off-network syndicated programming and they could not successfully coordinate a strategy of warehousing off-network programs.[15] These arguments reflect a fundamental misunderstanding of the various ways in which the networks can use their position in the market for off-network syndicated programming to harm both program suppliers and independent stations.

The concern about network warehousing of off-network programming was first presented to the FCC by the Justice Department in 1983. The Justice Department

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14 ABC Comments at 12 n.33. The record fully supports this conclusion. F. Warren-Boulton & J. Woodbury, "Economic Analysis and Policy Implications of the Financial Interest and Syndication Rule" at App. C (Jan. 24, 1991) ("Warren-Boulton & Woodbury").

15 ABC Comments at 12-13.

observed that a network "may have incentives to withhold off-network programming that it controls in order to increase license fees [paid by independent stations for off-network programs] and, possibly, advertising rates."[16] The Department informed the Commission that this practice -- which it termed "warehousing" -- "would not be in the public interest. Consumer harm would result from a reduction in the amount of programming available to television viewers, either because broadcasters were substituting less desirable programming for off-network shows or *because fewer stations remain* and therefore fewer total hours of programming were aired."[17]

The networks argued in 1983, as ABC does now, that they could not engage in such practices because "they have no monopsony power and therefore would be unable to monopolize syndication rights."[18] The networks further argued, as ABC also does now, that they could not collusively warehouse programs. The Justice Department rejected those arguments in 1983, as did the Commission.[19] In 1990, however, the Justice Department did an about-face, embracing the networks' position without pointing to any change in facts that would support this abrupt change. The Commission

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16 *In the matter of Amendment of 47 C.F.R. § 73.658(j); the Syndication and Financial Interest Rule*, Comments of the Department of Justice at 39 (Jan. 26, 1983) ("DOJ Comments").

17 *Id.* at 25 (emphasis supplied); *see also* Warren-Boulton & Woodbury at 28-36.

18 *In the matter of Amendment of 47 C.F.R. § 73.658(j); the Syndication and Financial Interest Rule*, Reply Comments of the Department of Justice at 14 (1983) ("DOJ Reply Comments"); *see also* ABC Comments at 11-13.

19 *See* Second Report and Order at 3321.

subsequently changed its view as well, but remained concerned that the networks might use their market position to warehouse a few recent off-network hits.[20]

ABC makes no showing in its comments why warehousing should be any less of a concern today than it has been in the past. And, indeed, warehousing should remain a concern to the Commission, because the networks retain both the incentive and the ability to warehouse. As the Justice Department concluded in 1983: "network monopsony power is *not* a necessary prerequisite for network control of enough programs" to engage in anticompetitive warehousing.[21] The Justice Department explained that the networks' ability and incentive to warehouse programs flowed not from the existence of monopsony power, but from the networks' unique "position as 'gatekeepers' to network television exhibition."[22] It is indisputable that, whatever other changes may have occurred in the television industry in the last twelve years, the networks still function as the "gatekeepers" to prime time and, hence, to successful syndication.[23] The networks told the Commission in a filing made with the agency just last month that "[t]he real appeal of the networks to the viewer is its [sic] programming. No one can compete with

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20 *Id.* at 3321-22.

21 DOJ Reply Comments at 14; *see also* Warren-Boulton & Woodbury at 28-30.

22 DOJ Reply Comments at 14. In its 1990 comments, DOJ never explains why this analysis is not correct, and the Commission's 1991 Order provides no rationale of its own. *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd 3094, 3133 (1991) ("First Report and Order").

23 *See* Section II.C., below.

the networks in this arena . . . . Only the networks have the wherewithal to afford the kind of high quality programming that the American public demands."[24]

Warehousing by the networks would be eminently feasible. The Justice Department has explained that warehousing "would not likely take the form of a total withholding of programming. Instead, it could involve merely a reduction in the number of series or episodes of a particular series made available for syndication."[25] Moreover, as Drs. Warren-Boulton & Woodbury explained, in order for warehousing to be profitable, the networks need own rights in only a relatively small number of programs.[26] Indeed, by withholding the lowest quality programs from a market, the network is able to increase the prices that will be paid for higher quality programs while foregoing only what little revenue it might have earned from the sale of the lower quality shows.[27] The fact that the networks have taken financial interests in approximately 40 percent of the shows added to their prime time schedules in the last two years[28] evidences the ease with which

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24 *Review of the Commission's Regulations Governing Television Broadcasting*, Economists Incorporated, "An Economic Analysis of the Broadcast Television National Ownership, Local Ownership, and Radio Cross-Ownership Rules," Vol. 2, App. H at 36 (May 17, 1995) ("Network Economists' Report").

25 DOJ Comments at 25 n.41. *See also* Warren-Boulton & Woodbury at 29-30.

26 Warren-Boulton & Woodbury at 29-30. To be sure, the Department of Justice noted in 1983 that if the difference in value among marginal programs is small, the networks would have to retain rights in a "substantial number" of programs. But it also emphasized that this would "not necessarily require holding a monopoly share of programs." DOJ Reply Comments at 23 n.36.

27 Warren-Boulton & Woodbury at 29-30.

28 Coalition Comments at 17.

the networks could also acquire syndication rights in a significant percentage of programs.[29] ABC's suggestion that the networks' ownership of syndication rights will never be sufficient to permit them to engage in warehousing is, therefore, plainly implausible.

ABC also argues that warehousing would require collusion on the networks' part and that such collusion would be risky and difficult to conceal from the antitrust enforcement authorities. But there can be tacit, as well as express, collusion. And tacit collusion, without more, is not actionable under the antitrust laws.

In determining whether firms are likely to be successful in reducing competition through tacit collusion, the Justice Department observes that three factors must be considered: (1) whether reaching terms of coordination would be difficult; (2) whether the firms involved have "an ability to detect . . . deviations that would undermine the coordinated interaction"; and (3) whether the firms involved have an ability to punish "cheaters."[30] If colluding firms can detect deviations from the coordinated

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29 The Seventh Circuit expressed doubt that the networks would acquire syndication rights in many shows, noting that the networks acquired such rights in no more than 35 percent of such shows before the Rule was adopted. *Schurz,* 982 F.2d at 1046. As the Justice Department correctly observed, however, "network behavior in the 1960s cannot be relied upon to predict network conduct today" because "[t]he value of syndicated programs at the time was far smaller than current prices" and, therefore, "[c]learly, the networks have more incentive to monopolize syndicated programming today." DOJ Comments at 43-44. Moreover, as noted above, monopoly control of syndication rights is not a prerequisite to successful warehousing.

30 Department of Justice and Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) at § 2.1 ("Merger Guidelines").

conduct and punish the cheaters, it is less likely that any firm will deviate from the coordinated terms, and thus more likely that the collusion will be successful.[31]

With respect to network warehousing, all three of these criteria are met. First, as the Justice Department concluded in its 1983 comments, "collusive [warehousing] arrangements may be difficult, but [are] by no means impossible, to reach and carry out."[32] Moreover, even incomplete coordination by the networks may be anticompetitive. As the Justice Department has more recently observed: "terms of coordination may be imperfect and incomplete -- inasmuch as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars -- and still result in significant competitive harm."[33]

Second, detecting deviations from coordinated terms would be relatively simple for the networks. The Justice Department has previously concluded that because "the network television industry is highly concentrated, barriers to entry are high, and syndication is such a highly visible process . . . cheating would be easy to detect."[34]

Third, punishing cheaters would be equally easy. As the Justice Department has noted, "temporary abandonment of the terms of coordination by other firms in the

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31 *Id.*

32 DOJ Comments at 40.

33 Merger Guidelines at § 2.11.

34 DOJ Comments at 40.

market" will often bring all firms back to the coordinated terms.[35] Indeed, in the case of warehousing, punishment administered in one geographic market may well be sufficient to deter cheating on the terms of the agreement in other geographic markets. There is no basis, therefore, for the Commission to accept ABC's bald assertions that the networks lack the ability and incentive to engage in warehousing.[36]

There is one additional, even more telling, piece of evidence that the Commission cannot ignore. ABC urges the Commission to repeal the syndication rule immediately because, it says, "the *only* effect of the restraints on off-network syndication is to depress the prices networks are willing to pay for off-network rights (*thus injuring network program suppliers*), as well as to bar new competitive entry into off-network syndication."[37] In other words, repeal of the syndication rule will, according to ABC, raise the prices program producers receive for prime time entertainment programs, and ultimately lower the prices independent stations must pay for off-network syndicated programs. But if this theory were correct, then program producers and independent television stations should be clamoring for the Rule's repeal. The fact that they are *opposed* to the Rule's repeal is the strongest possible evidence that the networks' theories and predictions are wrong.

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35 Merger Guidelines at § 2.12.

36 *See* Warren-Boulton & Woodbury at 28-30.

37 ABC Comments at 13-14 (emphasis supplied) (citation omitted).

The Commission was presented with the same incongruity concerning the positions of the affected parties in 1993, but chose to ignore it when it accepted the networks' theories and repealed the financial interest rule. The Commission can ill afford to make the same mistake again. For as the Commission observed in 1993, repeal of the syndication rule "poses a risk of greater harm if our informed predictions about network activity in the syndication (and first-run) areas are wrong. Incorrect predictions about network behavior in the latter areas would most greatly affect independent stations and undermine the important role they play in providing service to the public."[38]

B. The First-Run Syndication Safeguards Should Be Retained

In its 1993 Order, the Commission stated that it "continue[d] to be concerned" that a prohibition on active syndication of first-run programming by the networks remained necessary for the reasons the Commission set forth in its in 1991 Order.[39] Specifically, the Commission concluded that "(1) local broadcast stations need an unimpeded supply of first-run programming to compete with network and off-network programming in various non-prime time periods; (2) allowing the networks into first-run syndication could enable them to exploit their owned and operated stations and web of affiliates to handicap the launch of new first-run programs by independent syndicators, which would be detrimental to the maintenance of a diverse, competitive marketplace;

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38 Recon. Order at 8291.

39 Second Report and Order at 3329.

(3) allowing the networks into first-run syndication could undermine the objectives of the prime time access rule; and (4) by virtue of the market structure, network involvement in first-run syndication could diminish the amount of independent first-run programming aired on local television stations."[40]

As with the off-network syndication safeguards, the networks have made no showing that these Commission concerns are no longer valid. NBC and CBS do not even broach the subject in their comments. While ABC attempts to explain why the record since 1993 supports elimination of the first-run syndication safeguards, its explanations are woefully inadequate.

First, ABC's theories do not square with commercial realities. According to ABC, elimination of the first-run safeguards would benefit the viewing public by encouraging greater investment in first-run programming. Specially, ABC argues that "[p]roducers of first-run programs . . . might well be better off if an additional set of buyers were competing to finance their productions or engage in co-productions in exchange for program rights."[41] If this assertion were true, of course, then producers of first-run programs should be arguing in favor of eliminating the first-run syndication safeguards. This Coalition, however, includes many producers of first-run programming,

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40 *Id.* (quoting First Report and Order at 3144-45). While the Commission recognized that the need for the first-run syndication restrictions "could . . . abate in the near future" (*id.*), it noted that its scheduled review would allow it "to gauge as responsibly as possible whether [its] conclusion regarding the state of the 1993 market . . . and of developing market trends was accurate." Recon. Order at 8279.

41 ABC Comments at 17-18.

all of whom continue to oppose elimination of these safeguards. Other first-run syndicators, such as King World, stand equally opposed to elimination of the safeguards.[42] This is because the effect of removing the safeguards will be to harm, not help, such producers.

ABC argues that, in theory, the networks should not be able to injure first-run producers. It claims that network ownership of stations in key markets is of no import with respect to first-run syndication because "no network would have any incentive to require owned stations in such markets to reject attractive first-run programs (which would immediately be snapped up by competitors) in favor of less attractive network-supplied first-run product."[43] The world of television program decisionmaking is not, however, as simplistic as the picture ABC paints.

We agree that it would generally not serve ABC's interest to force-feed a poorly performing in-house first-run show to its stations if the stations had the opportunity to air a hit show produced by a third party. Where we disagree with ABC is with respect to the vast middle ground of shows -- the shows that are neither hits nor disasters. With respect to shows that are roughly comparable, a network has every incentive to favor its own shows. Indeed, in light of the fact that, as the Commission recognized,[44] first-run programming must clear the largest markets in order to be successful, a network would

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42 *See* King World Comments at 5-10.

43 ABC Comments at 15.

44 Second Report and Order at 3327.

even have the incentive to forego some short-term station revenues in order to help ensure the successful launch of its first-run product.[45] NBC's comments unintentionally illustrate this point in the context of prime time programming; they demonstrate that while the fraction of prime time pilots produced in-house by the networks has not risen in the last two years, the fraction of prime time programs produced by the networks that reach the air has increased significantly.

Finally, ABC argues that affiliated stations fail to provide the networks with an advantage in first-run syndication because the networks purportedly have no ability to influence their affiliates with respect to the latter's choice of programming.[46] This assertion, however, is directly contradicted by the comments filed by the affiliates earlier in this proceeding and, more recently, in the Commission's PTAR proceeding. Specifically, the affiliates filed comments in earlier phases of this proceeding urging the Commission to retain the syndication restrictions precisely because they were concerned that the networks would exert pressure on them to take certain programs.[47] And the affiliates' recent comments in the Commission's PTAR proceeding evidence their

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45 The networks' advantage of having guaranteed buyers for their first-run programs will only be enhanced if the Commission (or the Congress) increases the number of television stations an entity may own nationwide, as has been proposed. *See Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 3524, 3568 (1995) ("TV Ownership FNPRM") (proposing to allow a single entity to own any number of television stations nationwide so long as their combined reach does not exceed 50 percent of the national audience).

46 ABC Comments at 16.

47 *Evaluation of the Syndication and Financial Interest Rules*, Comments of the ABC Television Affiliates Association at 15 (June 14, 1990).

continued belief that their programming decisions are not immune from network influence. The affiliates specifically told the Commission that "the changes in the broader marketplace, though substantial, have not altered the relative balance of power between networks and affiliates."[48]

In short, contrary to ABC's claims, the record in 1995 provides the Commission with no basis for concluding that the concerns the agency has consistently expressed regarding network participation in first-run syndication are no longer valid. Accordingly, the Commission has no reasoned basis for permitting the existing first-run syndication restrictions to expire.

II. THE RECORD REQUIRES THE COMMISSION TO STRENGTHEN THE FISR

A. The Rule's Proponents Have Met Their Burden Of Proof

The principal argument advanced by the networks in their initial comments is that there is simply no justification for this proceeding. CBS argues that the record compiled by the Commission in the earlier phases of this proceeding is "fully sufficient to justify elimination of the remaining rules."[49] ABC, in a similar vein, argues that the Commission may not reconsider "its 1993 decision to do away with fin/syn restraints on

48 Comments of the Network Affiliated Stations Alliance at 2-3 (June 14, 1994). In the PTAR proceeding, the affiliates oppose elimination of the network restriction embodied in PTAR.

49 CBS Comments at 3.

the acquisition of network programs and on foreign syndication," even if the record of network conduct over the last two years demonstrates that none of the predicted benefits of that action has come to pass.[50] NBC presents the networks' position most bluntly, claiming that the Seventh Circuit "admonished the Commission not to change its mind about deregulating the television program marketplace at the end of the specified phase-out period."[51]

The networks' zeal for deregulation, however fashionable it may be as a general matter, cannot substitute for reasoned decisionmaking. Contrary to CBS' assertion, the record compiled in earlier phases of this proceeding does not provide a sufficient basis to justify elimination of the FISR. That record, as the Commission observed, contained conflicting evidence as to the likely consequences of repealing the FISR. Indeed, in 1991 the Commission found that, all facts considered, "the concerns that spurred the Commission to adopt the financial interest rule -- in particular, the networks' ability to extract rights from and condition the access of program producers to network schedules -- continue to exist despite the changes in the video marketplace since 1970."[52]

To be sure, the Seventh Circuit set aside the Commission's 1991 Order on the ground that the Commission had not adequately explained how its conclusions squared

50 ABC Comments at 1 n.1.

51 NBC Comments at 2.

52 First Report and Order at 3104.

with the economic theories advanced by the networks. The court cautioned, however, that the networks' arguments were "speculative, theoretical, and may . . . be all wet."[53] For this reason, while the Commission chose simply to embrace the court's critique of the Rule in its 1993 decision, it also recognized its obligation to undertake a review two years later to determine whether the marketplace evidence confirmed the networks' predictions that producer and viewer benefits would flow from repeal of the financial interest rule.

Obviously, if the marketplace evidence from the last two years demonstrates that the networks' predictions are *in*accurate, then the arguments and evidence presented by the networks in earlier phases of this proceeding are meaningless. And, contrary to ABC's assertion, if the evidence demonstrates that the theoretical assumptions underlying the networks predictions are flawed, reasoned decisionmaking requires the Commission to reconsider its decision to repeal the financial interest rule. That decision, after all, was based on the Commission's acceptance of the networks' theories and predictions. This is why the Commission concluded that, if the networks' predictions did not come to pass, "a tightening of our finsyn rules" could be warranted.[54]

The Coalition is well aware that the Commission has placed the "burden of proof" in this informal rulemaking proceeding on the proponents of the FISR. As the

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53 *Schurz*, 982 F.2d at 1051.

54 Recon. Order at 8293. The networks cannot avoid reevaluation of the validity of the Commission's 1993 predictive judgments by asserting that the benefits of the repeal of the financial interest rule might materialize at some unspecified time in the future. The record before the Commission does not show a gradual trend toward the predicted benefits. Rather, it shows a dramatic turn in exactly the opposite direction.

initial comments filed in this proceeding make clear, that burden has been met. The Coalition, INTV and King World have shown that none of the Commission's predictive judgments concerning the benefits of the financial interest rule has proven accurate. The networks have made no showing to the contrary. Indeed, the networks' comments are devoid of any meaningful information concerning their acquisition of financial interests in prime time programming. Given the evidence that is now before the Commission -- evidence that illustrates with clarity the Supreme Court's recent observation that "market imperfections can keep economic theories . . . from mirroring realities"[55] -- any decision by the Commission to rely on the networks' predictions concerning the benefits of repealing the FISR would be arbitrary and capricious.

B. The Networks Have Made No Showing That Their Practices In Acquiring Financial Interests Warrant Repeal Of The FISR

The networks argue in their comments that changes in the marketplace since 1993 justify immediate repeal of the Rule's remaining provisions. The Commission can be certain that, if there were marketplace evidence demonstrating the accuracy of the Commission's predictions concerning the benefits of the repeal of the financial interest rule, it would be highlighted in the networks' comments. Yet, no such evidence is presented. That is because, as we demonstrate in our initial comments, *there is none.*

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55 *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 459 (1992) (quoting 903 F.2d 612, 617).

Even though the purpose of this proceeding is to gauge the accuracy of the Commission's predictions concerning the FISR's repeal against the reality of the networks' conduct over the last two years, the networks present no evidence from which the Commission can draw any meaningful conclusions about their practices in acquiring financial interests in programs. ABC presents no evidence whatsoever. NBC offers the Commission limited data *through the 1993-94 season.*[56] But it is only the programs sold for the two television seasons *after* the 1993 decision took effect -- *i.e.,* the 1994-95 and 1995-96 seasons -- that provide evidence of network conduct in the absence of the financial interest rule.[57] While NBC asserts that in-house productions will account for "only" 22 percent of the networks' regularly scheduled entertainment series in the 1995-96 season,[58] the network provides the Commission with no information concerning the 1994-95 season.

In fact, as illustrated in Appendix A, in the two years since the financial interest rule was repealed, network in-house productions have accounted for an average of 31 percent of regularly scheduled entertainment series pick ups in prime time. This represents a significant jump in network in-house production, from an average of

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56 NBC Comments at 7.

57 The 1993 decision took effect on June 5, 1993. The Fall 1993 schedule was finalized in May 1993, prior to elimination of the financial interest rule.

58 NBC Comments at 7.